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IN THE

Supreme Court of the United States

No. 295

JOSEPH BATTISTA, FRANK DiGIAMBATTISTA and ALBERT B. DiGIAMBATTISTA, Trading as NORVIEW FARM,

Appellants

v.

MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA,

Appellee

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves that present appeal be dismissed or that the final decree of the Supreme Court of Pennsylvania in the present case be affirmed on the grounds that the Federal question presented is so unsubstantial as not to warrant argument thereon.

STATEMENT

Appellee submits that the issue raised by this appeal presents no substantial Federal question for the reason that the rule of law governing the issue presented here is

well settled by a long line of decisions of the Supreme Court of the United States. Accordingly, there is no basis or valid reason for additional argument thereon.

The Commonwealth of Pennsylvania by its Milk Control Law regulates and controls the entire milk industry within the Commonwealth through the process of price control since 1937 on a permanent basis and prior thereto from 1933 on a temporary basis.[1] The Pennsylvania Milk Control Law authorizes the establishment of minimum resale prices of milk to consumers and the price handlers or dealers are required to pay for milk received from their producers. The Pennsylvania Milk Control Commission is the administrative body formed to carry out the purposes and provisions of the Pennsylvania Milk Control Law. Section 402 of the Pennsylvania Milk Control Law enumerates the exemptions from price control and regulation. The proviso portion is set forth in the margin.[2]

In the instant case, appellant, a producer-handler removed milk he produced on the farm to a processing plant of a nearby handler for pasteurization, homogenization and finally bottling in one-half gallon and gallon glass containers, which bottled milk was then returned to appellants farm for sale at retail to consumers below the minimum

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[1] Pennsylvania Milk Control Law, April 28, 1937, P. L. 417, as amended, 31 P.S. Sections 700j-101—700j-1302.

[2] "Provided, however, that in cash sales of milk to consumers in containers owned and provided by the consumer, if he shall have produced all milk on the farm where sold and such milk has at no time left the producer's farm prior to its sale to the consumer and he shall have neither purchased nor received milk from other producers or handlers and his total sales to consumers do not exceed two gallons to any one consumer in any one day, the producer so selling milk shall be exempt from the provisions of this act. As amended 1959, Nov. 21, P. L. 1587, Sec. 1."

retail sales price established by the Pennsylvania Milk Control Commission. The net effect of appellant's attack is that the Commonwealth in controlling the prices for the milk appellant sells violates, as to him, the due process clause in the 14th amendment to the Constitution of the United States.

Appellant contends that the rule of law that the State has the power to control the resale price of milk need not be reversed but on the contrary submits that the facts of the present case are distinguishable from the leading case establishing this longstanding rule of law as applied to the milk industry and accordingly is not applicable herein. Appellee submits that the rationale of the appellant is without merit and substance.

The Commonwealth of Pennsylvania further submits that the business conducted by appellant is of such a character that the Commonwealth may properly control the resale prices of the milk sold by appellee and it is immaterial that the business be conducted by a producer-handler or by any other milk dealer or handler. The function performed is the governing factor and not the descriptive labels.

QUESTION PRESENTED

The following question is presented by this appeal:

1. May a State control, within the due process clause, the price of milk sold by producers-handlers when the milk of the producer leaves the farm of the producer prior to the sale at retail to a consumer?

SUMMARY OF ARGUMENT

Long before the instant case was instituted, the Supreme Court of the United States had settled the question that the State has the power to regulate the milk industry through the means of price control. The net effect of the appellant's attack of that portion drawn herein of the Milk Control Law is to again test the propriety of the State to effectively regulate the milk industry. Since price control of the milk industry has been established by this Court as not violating the Due Process Clause of the Fourteenth Amendment, the appellant does not present a substantial Federal question.

The landmark decision (*Nebbia vs. New York*, 291 U. S. 502) considered in detail the evils sought to be eliminated by the regulation of the milk industry within the State of New York. The same considerations and rationale upon which this Court based its holding that price control in the milk industry did not violate due process is equally applicable and governs the present situation insofar as the protection to the producers is concerned. The purpose of the limitations on exemption drawn in question here was to equalize the position of all producers so that one may not obtain an advantage over another with regard to the fluid milk market. To argue otherwise would be in direct contradiction of the established purpose of milk control and the evils sought to be cured.

The instant case does not present a substantial question for the further reason that appellant attempts to

obtain jurisdiction on the theory that the business or economic conditions since 1934 have changed so that the well established rule of law is no longer applicable or if it is applicable, violates due process under present economic conditions. This is a matter not for this Court but for the Legislature.

ARGUMENT

A State may control the retail prices of bottled milk sold to consumers by a producer-handler without offending the due process clause.

Appellee, Commonwealth of Pennsylvania, submits that the question presented by appellant's appeal attacks a statute which is of a kind held constitutional by the Supreme Court of the United States.

Nebbia vs. New York, 291 U. S. 502, is the landmark case holding that the State, irrespective of the character of business, may control prices whenever such control could be reasonably related to a matter of public concern. Specifically, it held the State had the power to fix the retail price of milk. The requirements of due process was outlined in the *Nebbia* case, supra, by Justice Roberts, at page 527, in the following manner:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to endorse that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio."

The cornerstone of the effective regulation of the milk industry of Pennsylvania through the Pennsylvania Milk Control Law, like the New York Statute drawn in question in the *Nebbia* case, is through the medium of price control. This was clearly recognized by Justice Roberts when he said at page 538:

> "And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other".

The opinion in the *Nebbia* case details exhaustively the objects, purposes and evils sought to be eliminated by controlling the price for which milk shall be paid by the consumer and also paid by the dealers to the producer. The following language, at page 517 of the opinion is equally applicable to the instant case:

> "The fluid milk industry is affected by factors of instability peculiar to itself which call for special methods of control. Under the best practicable adjustment of supply to demand the industry must carry a surplus of about 20 per cent, because milk, an essential food, must be available as demanded by consumers every day in the year, and demand and supply vary from day to day and according to the season; but milk is perishable and cannot be stored. Close adjustment of supply to demand is hindered by several factors difficult to control. Thus surplus milk presents a serious problem, as the prices which can be realized for it for other uses are much less than those obtainable for milk sold for consumption in fluid form or as cream. A satisfactory stabilization of prices for fluid milk requires that the burden of surplus

milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor."

Both, the Pennsylvania Milk Control Law drawn in question by this appeal and the New York Law, were created by the existence of identical destructive economic conditions affecting the milk industry and each Law employed similar regulatory devices to stabilize the industry. This is substantiated by the lengthy preamble to the Pennsylvania Law and official legislative purpose as stated in the margin.[3] Accordingly, the present parrallel constitutional attack is well within the boundaries of this Court's holding in the *Nebbia* decision and precludes further consideration by this Court.

Further, this Court had before it the Pennsylvania Milk Control Act in *Milk Control Board of Pennsylvania vs. Eisenberg Farms Products*, 306 U. S. 346, wherein it held that the act manifested an attempt to reach and cure a domestic situation in the welfare of producers and consumers in the Commonwealth of Pennsylvania.

So too, in *Penn Dairies, Inc. vs. Milk Control Commission of Pennsylvania*, 318 U. S. 261, where Justice Murphy in the concurring opinion at 279 stated:

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[3] In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud. 1937, April 28, P. L. 417, art. 1, Section 101.

"We are not concerned here with just an ordinary state regulatory statute of nondiscriminatory character which affects the Federal government in some degree, but with a general measure designed to safeguard the health and well being of the public by insuring an adequate supply of wholesome milk at stable prices."

Historically, the specific provision of the act under attack herein was first enacted as an amendment to the original Milk Control Law in 1941 and further amended in 1959 in its present form as stated above. Prior to the amendments, the producer-handler who desired to sell milk at unregulated prices at their farm was prohibited. The legislative policy was to allow such producer-handler to be exempt from price control without intending to relax the control of the milk industry so as to cause a return to the unhealthy, uneconomic and destructive practices that the Milk Control Law originally sought to end.

Accordingly, the original purposes and objects sought in establishing price control, both at the consumer level and producer level, is controlling in the consideration of the present exemption as a whole and any specific provision in relation to due process.

To allow the appellant herein to conduct his business unregulated would have the obvious result of avoiding the objects of the Pennsylvania Milk Control Law that is, to achieve a fair division of the fluid milk market among all producers so that the sharing of the burden of surplus milk will be borne by all producers. Here the appellant would avoid this burden and obtain for himself a larger market for the more profitable fluid milk sales to the prejudice of the remaining producers.

The holding of the *Nebbia* case, supra, recognized the evils that large quantities of surplus milk leads to price cutting and other forms of destructive competition. When the present facts and statutory provision is tested by the objects of the act and the rationale employed in the *Nebbia* case, supra, the claim by appellant of discrimination fails.

Justice Roberts at page 527-528 in the opinion of the *Nebbia* case recognizes this very point when he states:

> "The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of business may be prohibited; and the right to conduct a business, or to pursue a calling may be conditioned. Regulation of a business to prevent waste of the state's resources may be justified. And statutes prescribing the terms upon which those conducting certain business may contract, or imposing terms if they do enter into agreements, are within the state's competency." (See cases cited.)

And further on page 538-539, Justice Roberts states:

> "The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people".

To the same effect is the holding in *Ideal Farms, Inc. vs. Benson*, 288 Fed. 2nd 608 (3rd Cir.), cert. den. 1961, 372 U. S. 965. The Circuit Court upheld the order of the Secretary of Agriculture issued pursuant to the Agriculture Marketing Agreement Act of 1937 as amended (7 U.S.C.A. 601 et seq.) wherein a producer (Ideal Farms) in the business of processing and distribution of milk, some of which was purchased from another corporation,

but who also produced a substantial portion of his own milk, was not entitled to the exemptive provisions of Federal Order No. 27, to that portion of the milk Ideal Farms produced on its own farm, but was required to account to the Producer Settlement Fund on its own milk, which resulted in sharing on its own milk its proportionate share of the surplus milk in the market. See also *Elm Spring Farm vs. United States,* 127 Fed. 2nd 920 (1 Cir. 1942) and *Shawangunk Co-operative Dairies vs. Jones,* 153 Fed. 2nd 700 (2nd Cir. 1946) dealing with exemptive provisions of orders issued pursuant to the same Federal Act.

This Court in *United States vs. Rock Royal Co-op., Inc.,* 307 U. S. 496, considered the validity of the Agriculture Marketing Agreement Act of 1937 and the orders issued by the Secretary of Agriculture equalizing the minimum prices to be paid producers for milk sold to dealers. In sustaining the validity of the said Act and the orders, this Court held that the purpose of the Act and the orders issued pursuant thereto is to achieve a fair division of the fluid milk market among all producers, thereby eliminating the disorganization which has theretofore been the consequence of competition among producers for the more profitable fluid milk market (Opinion of the Court, pages 548, 550).

In the *Rock Royal* case, supra, this Court had before it the regulation which exempted milk received from the handler's own farm from the effect of the order of the Secretary of Agriculture and this Court did not say that the Agriculture Marketing Agreement Act of 1937 would not permit such type of exemption (Opinion of the Court, page 551, note 14).

The Supreme Court of the United States has consistently reaffirmed the holding of the *Nebbia* case, supra,

and as recently as 1964, this Court stated in *Polar Ice Cream and Creamery Co. vs. Andrews*, 375 U. S. 361, 378:

> "Nebbia vs. New York, 291 U. S. 502 establishes that minimum retail and wholesale prices for milk produced and sold within the State do not offend the Due Process and Equal Protection Clauses".

In *Hageman Farms Corp. vs. Baldwin*, 293 U. S. 1963, this Court upheld an order issued pursuant to the New York Milk Control Statute fixing a minimum price for payment to producers pursuant to the Milk Control Law of New York, which had the effect of denying the complaining dealer to make a profit from the resale of the milk as not being in violation of the due process clause.

In *Borden's Farms Products Co., Inc. vs. Ten Eyck*, 297 U. S. 251, 261, this Court upheld the legislative regulatory scheme for assisting the milk industry by permitting discrimination between dealers who had and dealers who had not well advertised tradenames in allowing the latter dealer to sell bottled milk at a price one cent less than the price prescribed for the former.

For the reasons stated above, it is respectfully submitted that the present appeal be dismissed or, in the alternative that the final decree of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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